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No. 819

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IN THE

Supreme Court of the United States

October Term, 1957

DAVID H. RATNER, *Appellant*,

v.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,

and

HOOVER MOTOR EXPRESS CO., INC., ET AL., *Appellees*.

On Appeal from the United States District Court for the Southern District of Illinois, Southern Division

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

DAVID AXELROD
39 South LaSalle Street,
Chicago, Illinois
Attorney for Appellant

Of Counsel:

AXELROD, GOODMAN & STEINER
39 South LaSalle Street
Chicago, Illinois

JAMES L. GIVAN
1025 Connecticut Avenue, N. W.
Washington, D. C.

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Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, appellant submits this brief in opposition to the motions to affirm filed in this case by the United States of America, the Interstate Commerce Commission, and Hoover Motor Express Company, Inc., appellees. The points raised by such motions are duplicative and, therefore, both motions will

be dealt with jointly herein. Essentially, the motions raise two issues, as follows:

1. Did the Interstate Commerce Commission exceed the limits of its statutory or discretionary powers when it found, in a proceeding under Section 5 of the Interstate Commerce Act: "The burden of showing that the proposed coordinated operations *would meet a public need and* would be consistent with the public interest is upon applicant"? (Emphasis added).

2. If the foregoing finding did exceed the Commission's statutory and discretionary powers, do its remaining findings cure this error?

This brief will be addressed to these two questions.

1. The Assailed Order Exceeds the Commission's Statutory and Discretionary Powers

Section 5(2)(b) of the Interstate Commerce Act, under which the order in question was entered, provides, so far as here pertinent, that:

> If the Commission finds that . . . the proposed transaction . . . will be consistent with the public interest, it shall enter an order approving and authorizing such transaction . . . .

Purporting to act under the above-quoted statutory authority, the Commission found, as a matter of law, that:

> The burden of showing that the proposed coordinated operations *would meet a public need and* would be consistent with the public interest is upon applicant. (J. St. 12a, 13a), (Emphasis added).

On its face, the foregoing finding imposes a burden of proof far more onerous than that required by the statute. Although the three-judge district court sustained the Commission's order on other grounds, the majority found that: "The use of these words in the order are unfortunate and do not correctly state the law . . ." and District Judge Briggle, in his dissenting opinion stated:

> I think it obvious that the Commission proceeded on an erroneous basis and imposed on plaintiff a burden not warranted by the Act. I cannot close my eyes to the fact that this of necessity affects the integrity of their findings and order. I, therefore, respectfully dissent.

Thus, the language of the statute, as well as the opinion of both the majority and the minority in the court below, make it plain that there is no express statutory authority for the Commission's finding. If authority exists, it must be found in the indefinite realm of administrative discretion. We shall undertake to show that the imposition of the added burden of proof contemplated by the assailed finding exceeds the permissible limits of administrative discretion.

First, let us examine the cases cited by appellees which are alleged to portray "circumstances like those here", and to uphold the proposition that the Commission may require proof of public need in a proceeding under Section 5 of the Interstate Commerce Act.

The first case cited is *Seltzin* v. *United States*, 102 F. Supp. 320, affirmed, 343 U.S. 944. Approval of this application by the Commission would have resulted in conversion of the vendor's operating authority from "irregular route" authority to "regular route" au-

thority. Regular route carriers and irregular route carriers are classified as separate and distinct types of carriers for purposes of regulation under the Interstate Commerce Act. See *Classification of Motor Carriers of Property*, 2 M.C.C. 703. For a carrier to convert from irregular route authority to regular route authority requires proof of public convenience and necessity. See *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23, sustained 80 F. Supp. 110, affirmed, 335 U.S. 875. In the circumstances, the Commission quite properly held, and the court quite properly sustained it in holding, that in addition to the question whether the proposed acquisition of the operating rights involved by Schein's Express would be consistent with the public interest, there was also to be considered the collateral question of the conversion of those rights from irregular to regular routes, and that as to the latter, proof of public need was required. The Commission's authority to decide collateral questions of public convenience and necessity arising as an incident to applications under Section 5 of the Act is considered and explained in *C. & D. Motor Delivery Co.—Purchase—Elliott*, 38 M.C.C. 547; and in *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415.

From the foregoing it will be seen that the circumstances of the *Schein* case were quite unlike those of the present case, and that, read in its proper context, the court's decision does not hold that proof of public need may be required in a proceeding governed solely by Section 5 of the Act.

The other two cases cited by appellees are *Houff Transfer* v. *United States*, 105 F. Supp. 851, and *Herrin Transportation Co.* v. *United States*, 108 F. Supp. 89,

affirmed 344 U.S. 925. In the latter case, which was decided by the district court in September, 1952, it was shown that the vendor was bankrupt, had ceased operations entirely in December, 1946, and that no operations had been conducted under the certificate sought to be transferred since that date. In other words, the operating rights sought to be transferred had been completely dormant for more than five years. The Commission held that in these circumstances, revival of this operation through transfer of the dormant certificate to another carrier would be tantamount to the institution of an entirely new service, and that it would not authorize such a transfer in the absence of evidence showing a need for such new service. In sustaining the Commission's order in this case, the court did *not* consider or discuss the question whether the Commission exceeded its authority in requiring proof of "need", but merely found that the Commission's order had a rational basis, and was predicated on adequate findings supported by evidence. So far as appears, the issue raised by the present appeal was neither raised nor considered in the *Herrin* case.[1]

It also should be noted, in contradistinction to the dormancy which was the outstanding feature of the *Herrin* case, that Tompkins Motor Lines, the vendor herein, handled over 50 million pounds of freight in the

[1] In fact, the plaintiffs in the *Herrin* case were in no position to raise this issue because after the examiner had found an abandonment or discontinuance of operations they requested a further hearing in which they undertook to show that public convenience and necessity existed for the proposed revival of operations. Thus, the findings of the Commission with respect to public need were directly responsive to the issues presented at the hearing by the applicants.

year preceding the filing of this application, of which approximately 27 percent was interchanged with connecting motor carriers, and earned a gross revenue of $859,196. There is, therefore, a substantial factual dissimilarity which renders the principle of the *Herrin* case inapplicable.

The remaining case cited by appellees, *Houff Transfer* v. *United States,* is similar in facts and in principle to the *Herrin* case discussed above. In this case, although the rights sought to be transferred were not entirely dormant, they were so little used that approval of the transaction under consideration obviously would have resulted in the establishment of an entirely new service. Here too, as in the *Herrin* case, the court was not called upon to decide, and did not decide, whether the Commission might lawfully invoke the doctrine of public need in a proceeding under Section 5 of the Act. Instead it merely decided that the Commission had taken into consideration all pertinent factors and properly arrived at the conclusion that the transfer for which approval was sought would result in a new service bearing little resemblance to the service theretofore available under the seller's rights, there being a total lack of evidence that such new service would be consistent with the public interest.

The question whether "public need" must be proven in proceedings under Section 5 of the Act has been squarely presented, considered, and decided in only two cases prior to the present one. Those cases are *M. & M. Transportation Co.* v. *United States,* 128 F. Supp. 296, affirmed, 350 U.S. 857, and *Anderson Motor Service* v. *United States,* 151 F. Supp. 577. Each of these decisions was by a three-judge district court, and

each held unequivocally that "public need" was not a requisite element of proof in proceedings under Section 5 of the Interstate Commerce Act. Therefore, the weight of decisional authority sustains appellant's position and the opinion of the court below serves but to emphasize the need for an authoritative resolution of this question by this Court.

The Government undertakes to distinguish both of the foregoing cases on the ground that proof of public demand "may be essential if the proposed service constitutes a serious threat to competitors, but not essential if there is no such threat"; and also on the ground that "in the cited cases, the Commission in effect found that the applicant had shown that there existed a public need for the service proposed". Thus, the government in its motion, like the Commission in its variety of inconsistent opinions, seems unable to make up its mind as to where a showing of public need is or is not an essential element for a showing of consistency with public interest. Indeed, the government's position seems to be in effect that the Commission is free to insist upon the requirement of a showing of public need when it is disposed to deny an application under Section 5(2), and to dispense with such a showing when it is disposed to grant an application. No position could be better calculated to encourage arbitrary and virtually unreviewable administrative action.

Actually, the relevant and undisputed facts in the present case are closely similar to the facts in the *M. & M.* and the *Anderson* cases. Here, as there, the only change in service proposed is a better coordinated interline operation, referred to in the *M. & M.* case as a "unified service, operated more efficiently", and in the *Anderson* case as an "improved

service to the public". (See government motion, Page 8, Note 2). Nor can the cases be distinguished on the ground that in the cited cases, the Commission found that competing carriers were strong enough to withstand the more vigorous competition which would result from the improved service, but made no such finding in the present case. The significant point is that in the present case it made no affirmative finding that competing carriers were *not* strong enough to withstand increased competition. Its vague reference to possible adverse effects does not rectify this omission, nor does it provide a tangible basis for distinguishing this case from the cases cited.[2] Indeed, it but serves to illustrate the manner in which the Commission plays ducks and drakes with the requirements of the statute and the rights of the parties before it, making specific findings in one case, where that suits its purpose; in other cases, where the record will not support the type of findings it desires to make, resorting to inconclusive inferences and intimations, as it has done here.

In addition to the decisions discussed above, which clearly hold that proof of public need may not be required in a proceeding arising under Section 5(2) of the Act, the language of the statute itself severely limits the permissible range of the Commission's discretion in interpreting the meaning of the phrase "consistent with the public interest" as used in Section 5 of the Act. Throughout the Act, the Congress has used

[2] In this connection, it is ironic to note that the principal protestants who handled a substantial amount of interline traffic with Motor Lines and were consequently the only ones who could be substantially affected by the improved coordination between Hayes and Motor Lines, withdrew their opposition after the hearing.

other language, imposing varying degrees of proof in the case of different types of applications. For example, to obtain a certificate initially, a carrier must prove not only that it is fit, willing and able properly to perform the service proposed, but that the service proposed *"is or will be required by the present or future public convenience and necessity"*. (Section 207 (a)).

In establishing through routes between railroads, and between railroads and water carriers, the Commission is authorized to impose certain requirements if it finds that the through route proposed to be established *"is needed in order to provide adequate and more efficient or more economic transportation"*. (Section 15(4)).

In times of emergency, the Commission is authorized to establish temporarily such through routes as in its opinion *"are necessary or desirable in the public interest"*. (Section 15(4)).

Even in proceedings under Section 5 of the Act, with which we are directly concerned, two different degrees of proof may be required. Whenever a railroad is a party to a proposed transaction under Section 5 which also involves a motor carrier, the Commission must find, not only that the transaction would be consistent with the public interest, but also that it "... *will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition*". (Section 5(2)(b)).

Clearly the Congress intended some distinction between the quantum of proof required in the several circumstances outlined above. If it had not, it could readily have used the same language throughout all

Sections of the Act. This being so, it does not lie within the permissible limits of administrative discretion so to interpret any one of these several standards as to impose a burden of proof as great as that imposed by another, more onerous standard. To do so is, in effect, to substitute the latter for the former, a prerogative which is reserved exclusively to the Congress.

The point is aptly summarized in terms of the case at bar, in the decision of the district court in *M. & M. Transportation Co.* v. *United States, supra.* In that case it was urged that the Commission had erred in *failing* to require proof of public need. In footnote 4 of its decision, the court held:

> The distinction between Section 5's "consistent with the public interest" and Section 207's "public convenience and necessity" disposes of the contention as to a finding of public need. And even within Section 5, it is evident that Congress intended a distinction between "public interest" and "public advantage". Petitioners' argument that the Commission must find the existing service inadequate in a Section 5 proceeding has been rejected by the Supreme Court. (Citing *McLean Trucking Company* v. *United States,* 321 U.S. 67, 86-87).

For the several foregoing reasons, it is submitted that the Commission has neither express statutory authority nor permissible discretionary power to impose the test of "public need" as a requisite of proof under Section 5 of the Act. Even the court below, which sustained the Commission's decision on other grounds, held that in this respect, the Commission's report *did not correctly state the law.*

2. The Commission's Remaining Findings Do Not Cure This Basic Error

The Commission's flagrantly erroneous finding that the burden was upon applicant to show that the proposed transaction "would meet a public need" was lightly dismissed by the court below with the rhetorical question: "Should this case be decided upon a mere play of words?" The court went on to state that the Commission had made other findings adequate to sustain the conclusion that the proposed transaction would not be consistent with the public interest. In their motions to affirm the decision of the district court, appellees stress this same argument: That the Commission's report, considered as a whole, adequately sustains the conclusion reached.

In the light of this argument we turn to the Commission's other findings which are alleged to sustain its ultimate decision. In considering these findings, the Court is urged to bear in mind the warning expressed in the dissenting opinion of Judge Briggle:

> I think it obvious that the Commission proceeded on an erroneous basis and imposed on plaintiff a burden not warranted by the Act. I cannot close my eyes to the fact that this of necessity *affects the integrity of their findings and order.* (Emphasis added).

Apart from the Commission's ultimate finding regarding appellant's burden of proof which has previously been quoted, there are eight other findings which bear upon the denial of the application. These are quoted below and are assigned numbers to facilitate reference to them in the discussion which follows.

> 1. The evidence shows that the present managers of Motor Lines are competent and experienced

in their respective fields, and that under their control it has for at least the first 3 months of 1955, conducted a profitable and balanced operation, and it is reasonable to assume that it could so continue to operate in the future. (J. St. 10a).

2. The evidence generally shows that Motor Lines interlined substantial traffic with other carriers at Nashville moving to points in the area served by Hayes and that Hayes also interlined traffic at Nashville moving to points served by Motor Lines.

   The evidence also shows that prior to 1955, no substantial interline occurred between the two carriers, but that the relationship changed considerably after the instant agreement. (J. St. 11a).

3. If applicant were to acquire control of Motor Lines, its operations in unison with those of Hayes and Service unquestionably would make available to the shippers in such area a transportation service not presently existing, and one which assuredly would result in diversion of traffic from the existing carriers. (J. St. 12a).

4. . . . the present interline service of a number of carriers would be in direct competition, in some instances, with coordinated operations of the carriers controlled by applicant if the application were approved. Most protestants have indicated the volume of their traffic in the considered territory, and although they have not detailed specifically the traffic which they believe would be lost to such proposed operations, their evidence is sufficient to show that they would be adversely affected thereby. (J. St. 12a).

5. Based on the evidence now of record, there is no adequate showing that overall management

by applicant of Motor Lines is **required** to continue satisfactorily its operations. (J. St. 10a).

6. The evidence of the public witnesses presented by applicant does not indicate a **need** for any through service between the territories served by any of the carriers controlled by applicant and that served by Motor Lines. (J. St. 11a).

7. The evidence also fails to show that existing carrier service in the area served by Motor Lines is **inadequate** or that new traffic is available. (J. St. 11a).

8. The revitalization of operations under these little used rights evidently is not **needed** to meet the transportation requirements in the area involved, nor is there any showing that Motor Lines has rendered any service between Atlanta and Greensboro or between Atlanta and Memphis, or that any **need** exists for the inauguration of such service. (J. St. 12a).

In the four findings last-quoted above, bold face type has been used to emphasize the constant reiteration of the word "need" or other words connoting "need". *Four of the eight findings quoted above are based expressly upon the erroneous concept that appellant was under an obligation to prove that there was a public need for approvel of the proposed transaction.* The Commission's misconception of the law permeates its report and critically "affects the integrity" of its findings.

Without unduly belaboring the subject, we wish to comment briefly upon some of the above-quoted findings of the Commission.

Finding No. 1 states no ground for denying the application. It merely states that Motor Lines was

operating at a profit. This is no legal impediment to its sale; the Act does not contemplate that a carrier must be in financial distress before it may be sold.

Finding No. 2 states no ground for denying the application unless the Commission intends to overrule all of its prior decisions on this point. The Commission has repeatedly held that where two applicants have both participated substantially in the movement of interline traffic, the fact that they *could* have interchanged such traffic with each other, whether they did so or not, precludes a finding that their combined service would be substantially new or different from that which they had previously performed individually. See *G. & M. Motor Transfer Company, Inc. Common Carrier Application,* 43 M.C.C. 497; *Michigan Express, Inc.—Purchase—Williams,* 45 M.C.C. 211; *Hubert—Purchase—Service Freight Lines,* 45 M.C.C. 717; *C. A. Conklin Truck Line, Inc.—Purchase—Wilhelm Transport Co.,* 59 M.C.C. 763; and *Warwood Transfer Co.—Purchase—T. A. Scott and John E. Armstrong,* 65 M.C.C. 1.

Findings Nos. 3 and 4 are to the effect that approval of the application would make available a transportation service not presently existing (which is contrary to the holding of the decisions cited above) and that such service would result in diversion of traffic from existing carriers who would be adversely affected thereby.

Whenever two carriers merge, or, as here, coordinate their services, there is bound to be some displacement of existing traffic patterns. This was recognized, with approval, by the district court in the *M. & M.* case, supra, which stated in footnote 4 of its decision:

> Lastly, it would not seem that the creation of a new service would be inconsistent with the public interest—on the contrary, it might greatly benefit the public. If petitioners' argument were to prevail, acquisitions would be limited to those involving non-contiguous carriers, or carriers which substantially interchanged all through traffic with one another.

In *Quinn Freight Lines—Purchase-Wadkins*, 58 M.C.C. 801, sustained, 114 F. Supp. 558, affirmed 346 U.S. 890, 347 U.S. 908, the Commission held that:

> The fact that vendee, an aggressive carrier, will divert some traffic from competitors, standing alone, is no bar to approval of the application.

The ultimate test to be applied is that which is spelled out in Section 5(2)(c) of the Act, i.e.: "The effect of the proposed transaction upon adequate transportation service to the public". A mere finding that some diversion of traffic may occur, unaccompanied by a finding that adequate transportation service to the public will thereby be impaired is not sufficient to sustain denial of an application. By the Commission's own admission that the protestants did not detail specifically the traffic which they believe would be lost, the evidence before it was not sufficient to enable it to make such a finding.

It is not so much the purpose of the foregoing discussion to argue the merits of the four findings considered, as it is to point out and to emphasize the fact that, standing alone, they are plainly inadequate to sustain the Commission's ultimate conclusion that the application should be denied. The Commission's ultimate conclusion depends upon the remaining four findings quoted above for a complete statement of the

grounds for denial. But, as shown, those remaining findings are, in turn, predicated upon the legal misconception that it was appellant's burden to prove the existence of a public need for approval of the proposed transaction. Thus, if the Court agrees that the Commission's crucial finding respecting appellant's burden of proof is in error, as the court below held that it was, then, for the same reason, the findings numbered 5 through 8 above must fall, and not enough will then remain to sustain the Commission's decision. The error in the Commission's decision cannot be dismissed as a "mere play of words". It is fundamental. It permeates the entire report and invalidates many of the subordinate findings upon which the Commission's ultimate conclusion must depend.

It is also noteworthy that the government's motion does not undertake to show how the subordinate findings of the Commission, if divorced from the concept of public need, could reasonably be thought to support its ultimate conclusion that applicants had failed to establish consistency with the public interest. Instead, the government relies upon the district court's finding that "entry of plaintiff into the area would disrupt the competitive balance with harmful effect on the competing carriers without compensatory benefits to the public, and would not foster sound economic conditions in the industry". This, the government *further* interprets as "absence of proof of any advantage flowing to shippers from the changed character of operations ensuing from bringing Motor Lines under appellant's control". (See Page 6 of government motion).

Entirely apart from an examination of the record, which certainly contains proof of the advantages that would flow to shippers from the coordinated operations,

one can search the opinion of the Commission minutely without discovering any justification for the findings attributed to it by the district court's opinion and the government's motion. Indeed, the very assumption that the appellant's control of Motor Lines would offer a greater threat to competitors suggests that the applicant would be offering an improved service to the public as compared with that offered by Motor Lines independently. The failure of the Commission to face up to these issues as demonstrated by the complete absence of findings either with respect to improved service to the public, or the seriousness of damage to competitors cannot now be supplied either by the unsupported assumptions of the district court's opinion or the bald assertions of the government's motion. This Court has frequently announced and applied the salutary principle "that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained". *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 95. And, as this Court said in *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489. "If an erroneous statutory conclusion lies hidden in vague findings, then statutory rights will be whittled away. Insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain".

CONCLUSION

In *McLean Trucking Company* v. *United States*, 321 U.S. 67, this Court recognized that it was the policy of Congress to encourage "the organization of stronger units in the motor carrier industry". It stated that consolidations of motor carriers were not to be limited

to those instances where present service is shown to be inadequate, for to do so:

> . . . would ignore the fact that the Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices.

It is true that in the *McLean* case the Court also recognized the duty of the Commission to consider the effect of a proposed merger on competitors and on the general competitive situation in the industry. Appellant does not deny that the Commission can and should consider the competitive effect of any merger or consolidation or other transaction under Section 5 of the Act. However, this does not give the Commission the right to impose standards of proof above and beyond those specified in the Act. This is neither administration nor adjudication—it is legislation, a power which the Commission does not possess.

The principle involved was considered and decided by the Court fifty years ago in *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U.S. 452,—a landmark case dealing with the doctrine of administrative finality. At Page 470 of its report the Court enumerated the matters to be considered in determining whether an order of the Commission should be suspended or set aside. Among these was the following:

> . . . whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule

> that the substance, and not the shadow, determines the validity of the exercise of the power.

This statement—made by the Court fifty years ago—aptly characterizes the present case. Although purporting to act within the confines of a delegated power, in substance, the Commission has sought to impose a burden of proof far greater than that imposed by the statute, and thus, has gone far beyond the limits of the statutory power conferred upon it. If its decision is sustained, the effect will be to confirm in the Commission the arbitrary power to deny any application under Section 5 in which stark and absolute necessity cannot be proven. Obviously such a result is not compatible with the intent of Congress to encourage the unification of motor carriers and the assertion of such a power by the Commission presents a question of critical importance which not only warrants, but requires, consideration by this Court.

Wherefore, for the reasons stated, the motions to affirm should be denied.

Respectfully submitted,

DAVID AXELROD
39 South LaSalle Street
Chicago, Illinois
Attorney for Appellant

Of Counsel:

AXELROD, GOODMAN & STEINER
39 South LaSalle Street
Chicago, Illinois

JAMES L. GIVAN
1025 Connecticut Avenue, N. W.
Washington, D. C.